81-63

Office Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BOB MAXFIELD, INC., d/b/a BOB MAXFIELD AMERICAN, BOB MAXFIELD AND SONDRA MAXFIELD,
Petitioners

v.

AMERICAN MOTORS CORPORATION, MEMORIAL BANK OF HOUSTON, TEXAS, AMERICAN MOTORS SALES CORPORATION, AND AMERICAN MOTORS REALTY CORPORATION,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Bob Maxfield — Petitioner
2. Sondra Maxfield — Petitioner
3. William Fraker — Appellant
4. Aileen Fraker — Appellant
5. American Motors Corporation — Respondent
6. Memorial Bank of Houston, Texas — Respondent
7. American Motors Sales Corp — Respondent
8. American Motors Realty Corp. — Respondent

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QUESTIONS PRESENTED

1. In a civil antitrust "tying" case, what type and quantum of proof is necessary to establish "coercion" on the buyer to accept the "tied" product in order to obtain the "tying" product?

2. In a civil Automobile Dealer's Day in Court Act case, is it essential to proof of "bad faith" that the evidence show a "coercive" demand that the dealer take action contrary to the dealers' lawful rights on the threat of reprisal or sanctions by the manufacturer, or may "bad faith" be proved in other ways?

3. Is the evidence in this case sufficient to raise issues of "coercion" and "bad faith" so as to require submission of "tying" and "DDICA" claims to the jury?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Bob Maxfield, Inc. d/b/a Bob Maxfield American, Bob Maxfield and Sondra Maxfield petition that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered February 23, 1981.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 637 F.2d 1033 and is printed in the appendix at page App. 1.

JURISDICTION

The Fifth Circuit's judgment was entered on February 23, 1981 (App. 1). Petition for Rehearing was denied on March 23, 1981. (App. B-2). Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. In a civil antitrust "tying" case, what type and quantum of proof is necessary to establish "coercion" on the buyer to accept the "tied" product in order to obtain the "tying" product?

2. In a civil Automobile Dealer's Day in Court Act case, is it essential to proof of "bad faith" that the evidence show a "coercive" demand that the dealer take action contrary to the dealers' lawful rights on the threat of reprisal or sanctions by the manufacturer, or may "bad faith" be proved in other ways?

3. Is the evidence in this case sufficient to raise issues of "coercion" and "bad faith" so as to require submission of "tying" and "DDICA" claims to the jury?

STATUTES INVOLVED

The statutes involved are Sec. 1 of the Sherman Act (15 U.S.C.A. Sec. 1), Sec. 3 of the Clayton Act (15 U.S.C.A. Sec. 14) and Sec. 2 of the Automobile Dealers Act (15 U.S.C.A. Sec. 1222), the pertinent portions of which are as follows:

Sec. 1 of the Sherman Act:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations is hereby declared to be illegal."

Sec. 3 of the Clayton Act:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to . . . make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities whether patented or unpatented, for use, consumption, or resale within the United States . . . on the condition, agreement, or understanding that the . . . purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the . . . seller where the effect of such . . . sale or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Sec. 2 of the Automobile Dealers Act:

"An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956 to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided,* That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith."

STATEMENT OF THE CASE

Bob Maxfield, Inc., d/b/a Bob Maxfield American ("Maxfield"), instituted suit against American Motors Corp. and Memorial Bank of Houston, Texas, on July 24, 1973, for violations of the Sherman and Clayton Acts, and the Automobile Dealers Act. R. I, Inst. 8, p. 34. By First and Second Amended Complaints, American Motors Sales Corp. and American Realty Corp. were added as Defendants. R. I, Inst. 12, p. 42; R. II, Inst. 36, p. 195. The Bank answered and counter-claimed against Bob Maxfield, Inc., for indebtedness, cross-claimed against American Motors Sales Corp. on the basis of guarantee, and impleaded third party Defendants Bob Maxfield and his wife, Sondra S. Maxfield, William L. Fraker and his wife, Aileen Fraker (Maxfield and Fraker were principals in Bob Maxfield, Inc.) also on the basis of guarantee. R. I, Inst. 24, p. 108. American Motors Sales Corp. answered and counter-claimed against Bob Maxfield, Sondra S. Maxfield, William L. Fraker and Aileen Fraker, seeking recovery of indebtedness that might be adjudged against it in favor of Memorial Bank. R. I, Inst. 31, p. 153.

Maxfield American presented for filing a Third Amended Complaint on April 7, 1977. R. III, Inst. 79, p. 441. It added specification of the offense of "exclusive dealing". Previous Complaints included closely related "tying" and "full-line forcing" claims. The trial court denied leave to file the Third Amended Complaint, R. III, Inst. 82, p. 452, and granted Motion in Limine prohibiting the mention of the exclusive dealing practice or the fact Maxfield was bound by an exclusive dealing provision in his lease. P.Ex. 10, para. 4. The Court also prohibited evidence regarding American's national tying

or "forcing" policy, or restrictions imposed on other dealers. Tr. I-13, 14.

Trial commenced May 9, 1977, and was completed May 31, 1977. Tr. I-3, XIII-2. During trial, issues involving indebtedness and guarantee were severed, to be submitted to the Court. At the conclusion of Plaintiff's evidence, the Court rejected motions for directed verdict. Tr. XI-43. At the conclusion of all evidence, the Court granted the Bank's motion for directed verdict, overruled American's motion, and announced that the case would be submitted upon the tying violation, and the Dealers Day in Court claims. Tr. XI-135, 136. The Court later reversed its position and granted motions for directed verdict on all Maxfield's claims. Tr. XIII-2, 3. Evidence concerning the counter-claims, cross-claims, and third party actions was heard immediately following this announcement. On April 23, 1979, the Court entered Final Judgment. R. IV, Inst. 114, p. 790.

On appeal to the Fifth Circuit, Appellants raised five points: (1) error in directing verdict on the "tying" claims; (2) error in directing verdict on the Dealers Act claims; (3) error in refusing to allow trial on and evidence of exclusive dealing; (4) error in excluding evidence of AMC's national "tying" or "forcing" policy, and evidence from other dealers subjected to restrictions; and (5) error in assessing indebtedness and attorneys fees against Appellants. No appeal was taken from the directed verdict in favor of the bank on the anti-trust and Dealers Act claims.

The Fifth Circuit disposed of the first two points by holding there was no evidence of coercion to sustain a "tying" or Dealers Act claim. It found no error in

excluding evidence of exclusive dealing, national "tying" or "forcing" policy, or other dealers subjected to restrictions. It therefore affirmed the granting of directed verdict on the Appellants-Plaintiffs anti-trust and Dealers Act claims, but remanded certain issues relating to Appellees-Defendants debt claims for re-trial.

STATEMENT OF FACTS

In the Fifth Circuit, directed verdicts are judged by the rule of *Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969), under which all evidence is reviewed and the facts are considered in the light most favorable to the Plaintiff. The facts are summarized in light of this rule.

Dealership Origin

In 1971, James Robert (Bob) Maxfield, III, obtained an American Motors Dealership. Separate franchise agreements were issued for automobiles and Jeeps. Tr. I-71. Both agreements were between Bob Maxfield, Inc., d/b/a Bob Maxfield American, a corporation owned 70% by Maxfield and 30% by William Fraker, and American Motors Sales Corp., subsidiary of American Motors Corp. The dealership facilities were constructed on property owned by American Motors Realty Corp., another subsidiary, in a highly desirable location in the City of Houston. Although American had no previous sales representation in the trade area serviced by the facility, it represented the company's largest investment in a retail agency in the country. Tr. IX-44. The property was leased to Maxfield by American Motors Sales Corp.[1] The lease

1. Ostensibly, American Motors Corp. manufactures automobiles and American Motors Sales Corp. sells them. However, from the regional sales level and above, all distribution functions are handled

was for five (5) years with minimum rent of $4,000 per month, (the maximum, calculated on basis of sales, was approximately $8,000 per month) and contained a provision that "new automobiles manufactured by American Motors Corporation only" could be sold. P.Ex. 10, para 4.[2] Initial capitalization of the dealership was $250,000, a figure suggested and represented to be adequate by AMC. I-62, 92. A wholesale floor plan credit line of $600,000 was secured from Memorial Bank. Tr. I-65. The facilities were under construction when the franchise was obtained, and were still incomplete when Maxfield moved in the latter part of March, 1972. I-74, 75. Rent was started April 1, 1972, Tr. I-76, and the "Grand Opening" was held April 25, 1972. Tr. I-88.

AMC's Position in the Market

It has been judicially recognized that American suffered financial difficulties between 1966 and 1971, but the early 1970's were a time of change:

> "With the introduction of new models ("Gremlins" and "Hornets")[3] American Motors began producing cars with market appeal and were competitive with other lines. Further, in 1972 American Motors initi-

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by American Motors Corp., and American Motors Sales personnel from the "zone" level and below are directly responsible to superiors employed by American Motors Corp. XI-541. Distribution is a joint function of the two, and, unless there is reason to distinguish them, the two companies will be referred to as "AMC".

2. This exhibit and many others appear in a two-volume compilation entitled "Exhibits to the deposition of Bob Maxfield, III".

3. In 1972 and 1973, the AMC line consisted of the Ambassador and the Matador, (mid-range or standard size) and Gremlins, Hornets and Javelins (small cars). The Ambassador was discontinued in 1974 or 1975.

> ated the Buyer Protection Plan which included a comprehensive one-year or 12,000 mile warranty. Its sales increased substantially."

Shor-Line Rambler, Inc. v. American Motors Sales Corp., 543 F.2d 60, 1976-2 Trade Cases ¶ 61,130, (7th Cir. 1976). AMC's smaller cars were reasonably priced, and competitive cars were becoming more expensive because of required pollution control devices. The Government, to help balance trade, tended to discourage importation of foreign cars. All of this helped make AMC's smaller cars more desirable. A-110, 111. AMC new car registrations were 3.03% of total U.S. registrations in 1970, 2.50% in 1971, 2.98% in 1972, 3.46% in 1973 and 3.79% in 1974, representing a low of 245,805 new units registered in 1971 and a high of 392,105 units registered in 1973. P.Ex. 533, p. 16. AMC's share of the Harris County, Texas, market was 2.4% in 1972, 3.3% in 1973 and 4.3% in 1974, representing 3019, 4582 and 5177 units, respectively.

Maxfield entered the market at an opportune time. According to AMC, during 1972 and 1973 demand for its small cars, particularly the Gremlin, exceeded production. Overall industry sales were at an all time high. In 1973 11½ million new cars were sold, the largest number in the history of the industry. Tr. VI-76.

Initial Reliance on American

In all crucial start-up decisions—amount of capital, number and "mix" of auto inventory, parts inventory, equipment, etc.—Maxfield relied completely on AMC, a fact well known to (and exploited) by AMC. I-89, 90.

The $250,000 capital was not only recommended and specified by AMC, but Semann, Zone Manager, said in his "honest opinion" Maxfield was adequately capitalized. Tr. VI-160. However, he conceded that capitalization was minimal, and he knew that Maxfield would be largely dependent on cash flow from the outset. Tr. VI-161. Relying on AMC's advice, Tr. I-92, Maxfield thus commenced business under circumstances which would quickly produce financial crisis when cash flow proved inadequate to meet current expenses.

Para. 13 of the Dealer Franchise Provisions, P.Ex. 9, states that AMC shall establish a sales planning potential for dealer's market area by which dealers sales performance shall be evaluated, with the dealer responsible to develop sales to reach potential. AMC first made a "forecast", or "planning potential" in a market study which projected estimated sales of 600 autos and 33 Jeeps during the first year of operation. Tr. I-56. Subsequently, this figure was revised to 1000 autos per year, and by the time the dealership commenced operation, it was revised again, and Maxfield was given a planning potential "travel rate" (projected sales rate) of 1185 cars and 56 Jeeps. Tr. I-70. This was regarded as Maxfield's "fair share" of the Houston market. Tr. I-71.

Maxfield relied on AMC in placement of orders for opening inventory, and initial stock orders. The number and type of cars that he received was determined solely by AMC. Tr. I-90. Orders for the 1973 line, introduced in September, were placed in June, after Maxfield had been in business only a couple of months. Tr. I-89, 99. AMC, through Rushing, District Manager, specified the number, type and models to order. Maxfield and his sales

manager filled out the order forms, but Rushing told them what to order. Tr. I-100.[4] Maxfield also placed total initial reliance upon AMC in ordering parts inventory. Tr. I-103. This reliance was made necessary by the fact that Maxfield did not possess the experience to know what would sell, and what would not. Tr. I-118, 120; III-181, 183.

"Start-up" Problems

Maxfield experienced various "start-up" problems. A staff was hired, and rent started, before the facilities were fully operational.[5] Tr. I-75, 78. This caused initial operating expenses to be inflated. Tr. I-75, 76; 112, 113. Monthly fixed operating expenses exceeded $12,500. Tr. I-88. Much of the expense incurred in March (when a staff was hired) and April (when rent started) was wasted because of delay in making the facility operational. Request for suspension of the first months rent was refused by AMC. Tr. I-76, 77.

There was no automatic lubricating equipment in the service area. Mr. Maxfield found he could secure the equipment under a lease arrangement with an oil company. AMC refused permission to install the equipment, unless Maxfield purchased it outright, Tr. I-79, because

4. The effect of automobile inventory upon capital and floor plan credit line is demonstrated by consideration of dealers prices, which averaged $4,000 to $4,500 for Ambassadors, $3,500 to $4,000 for Matadors, $1,800 (basic car) to $3,000 (heavily loaded) for Gremlins, $2,500 to $3,000 for Hornets and Javelins. Tr. V-54. Thus, in the lower priced brackets, two cars could be floor-planned for each Matador or Ambassador.

5. Maxfield prepared a list of deficiencies in the facilities shortly after the grand opening. Semann wrote "BS" on the list. AMC, Ex. 7. Eventually, most physical defects were remedied, but this expression of attitude was a harbinger of things to come.

the arrangement with the oil company would obligate Maxfield to purchase oil products from the oil company and reduce or eliminate usage of American oil products, Tr. I-80, which were more expensive. Tr. III-108D. Maxfield did not have capital to install the equipment, and AMC offered no plan comparable to that of the oil company. Tr. I-80. Permission to install the equipment was not received until April, 1973. Tr. I-81. A time and motion study made by Mr. Maxfield indicated that lack of equipment caused a loss of approximately $3,000 per month. Tr. I-86.

Because of complaints from other dealers, AMC cancelled all unfilled orders for yellow page ads placed by Mr. Maxfield under AMC's cooperative advertising program, and instructed him that he could only advertise in his "trade territory". Tr. I-116, 117.

Except for the lube equipment situation, the "start-up" problems were resolved in the first few months. After an encounter with certain employees who proved to be less than trustworthy, a good, competent staff was assembled in both sales and service. Tr. I-114. 1972 and 1973 were banner sales years for AMC, in Houston and the Nation. Tr. I-111. The dealership should have progressed profitably. However, problems with AMC, more serious than the beginning difficulties noted, were never resolved.

Deceit by AMC

AMC was guilty of deceitful acts. Two were designed to insure that Maxfield purchase parts and autos desired by AMC.

Some parts ordered for opening inventory on AMC's advice were designed to fit cars dating to the 1940's. It

was realized many of the parts might not be needed. Tr. I-103. Under the agreement with AMC, if it was discovered that the parts were not what were needed during the first 90 days, the parts could be returned for credit. Tr. I-103.

As the 90-day limit approached, Maxfield contacted AMC for the purpose of returning a large number of the parts. He was advised the parts should be left in inventory another 90 days. He was told by Aspen, Zone Parts Manager, that he could return the parts then if they still did not sell. Tr. III-112. Toward the end of the second 90-day period, Maxfield contacted AMC again and was told that the parts should have been returned at the end of the first 90-day period. Consequently, a substantial number (estimated value $9,000) represented "dead" investment. Tr. I-104.

In late 1972, after Maxfield had acquired some knowledge of what would sell and what would not, Rushing insisted that Mr. Maxfield buy more of the "heavier" cars (Ambassadors and Matadors), which were very slow moving. Mr. Maxfield did not want them, and said so. Rushing promised that if the cars did not move, he would see that they were "moved away". Tr. I-120. Mr. Maxfield bought them on the strength of this promise. In January, 1973, the cars had not moved, and Mr. Maxfield reminded Rushing of the promise. All that Rushing did was send a friend by, who bought one of the cars. Tr. I-120, 121.

The most deceitful acts by AMC were brought to light after the suit was filed. Apparently in reaction to Maxfield's resistance to attempts to force him to buy unwanted Ambassadors and Matadors, AMC decided early that the

dealership would be terminated, in one fashion or another. Morgan, AMC National Sales Mgr., testified that AMC determined from reports almost immediately after he started business that Maxfield was "uncoachable", i.e., would have "one play called from the bench and when he got up to the line, Maxfield would call another one". Tr. IX-44, 46. Morgan stated that personalities were such a strong factor that after they "agreed to disagree", "it was a hopeless thing". Tr. IX-45, 46. According to Morgan, it was "just a question of time" from AMC's standpoint. Tr. IX-46. Consistent with this testimony, Sandstrom, AMC Jeep District Manager, (who considered Maxfield a good dealer, Tr. VII-173) overheard statements made by Semann in late '72 and early '73 relating to continuance of the Maxfield dealership. Tr. VII-181. Derogatory comments were made by Semann and Schneider, Ass't Zone Mgr., and jokes were cracked (e.g.: "How does it feel to be steering the Titanic?"). Tr. VII-177; 178; 181.

Rather than openly state its position, AMC forced demise of the dealership by coercing an improper product mix (containing unsalable and slow to move autos) and shorting supply of salable autos. See discussion *infra*.

Coercion by AMC

Experience quickly taught Maxfield that heavier cars, particularly Ambassadors, moved very slowly, if at all. Tr. I-118. Gremlins sold most rapidly, and other small cars sold well. There were days when Maxfield was completely sold out of Gremlins. Tr. I-119. Customer preference was for the "basic" Gremlin in the lowest price range, and Maxfield became overstocked in the slower moving "loaded" Gremlins in the higher price range,

without sufficient "basic" Gremlins to balance inventory (which would have fostered sales of the "loaded" Gremlins). Tr. II-7. Because of reliance on AMC, Maxfield's "product mix" became "unbalanced" with excessive numbers of heavy cars and "loaded" Gremlins.[6] Maxfield began to resist AMC's "suggestions". Rushing asked him to join a sales contest. Maxfield refused, because it appeared expensive and inadvisable. Tr. I-107. Rushing became angry. Tr. I-107. During another "incentive" program, Rushing asked that Mr. Maxfield put false names on orders, to make it appear the cars had been sold. Maxfield declined, and again Rushing became unhappy. Tr. I-108.

The prime cause of conflict involved attempts to make Mr. Maxfield order cars he did not need. When it was observed that several Matadors and Ambassadors present at the grand opening were still in inventory late in the year, Tr. I-118, Maxfield spoke to Rushing. Tr. I-119. Rushing suggested special emphasis be put on Ambassadors, the sales price be cut, and salesmen be given incentives, stating "they needed to be sold". Tr. I-119. Later, in October, 1972, Rushing insisted that Maxfield buy more of the heavy cars, despite the problems with them. Rushing said if the cars did not move, Rushing would move them. Tr. I-120. This promise was not kept. See discussion under *"Deceit by AMC", supra.*

Rushing stated he had an "allocation" for Maxfield of each different type of car, and needed to get Maxfield to order the cars so that the entire allocation would be

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6. Rushing admitted that Maxfield's initial orders were secured on his recommendation. Tr. VII-12, 13. Schneider conceded that Maxfield relied on AMC's advice and wound up with an unbalanced inventory. Tr. XI-106.

placed, Tr. I-121 but Maxfield continued his resistance to purchase of Ambassadors and Matadors. In November, 1972, Maxfield's sales manager showed him three or four orders for Ambassadors, placed by Rushing without Maxfield's knowledge or consent. Maxfield advised AMC that he refused to take the cars. Tr. II-22-23. Rushing became angry. He said that if Maxfield would take the cars, he (Rushing) would move them out "pretty quick". Tr. I-23. Maxfield declined.

The month after this incident, Maxfield again refused to place an order for an Ambassador that Rushing wanted placed. Tr. II-2. Rushing became upset, pointedly noted the refusal on the order sheet, and circled the notation to clearly indicate the refusal. Tr. II-3.

After Maxfield began resisting placement of orders for heavy cars, the relationship with AMC became strained. Deliveries began to slow down. Tr. II-4. Orders for 99 automobiles were cancelled. Tr. II-5. Maxfield complained about slow deliveries, and non-deliveries, and was told that AMC was unable to produce the cars. Tr. II-6. This did not explain the fact that the number of autos (particularly Gremlins) delivered to Maxfield steadily declined, while orders increased. See P.Exs. 551, 40A. In all, Maxfield placed orders for over 300 cars which were never filled. This does not include the orders for the 99 cars that were cancelled. See P.Ex. 547.

AMC representatives became more formal, less friendly and less cooperative. Tr. II-4. Schneider and Rushing began making complaints about items that were insignificant or subjective. Tr. II-9.[7]

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7. This is consistent with testimony by Sandstrom that it was AMC's practice, in effect, to build a "termination file", that is to make entries in a dealer's file that could be used as justification for termination. Tr. VII-183.

In February, 1973, a "sales and profits" conference was held. Semann, Schneider, Rushing and Maxfield were present. P.Ex. 527 was presented to Maxfield. According to the analysis contained in the exhibit, Maxfield was 706 units behind "planning potential" travel rate, representing a loss of profits of $211,074 at $299 per unit. No explanation was given as to how Maxfield could sell cars when he could not get them from AMC.

During the conference, a phone call was made to Semann's superior, Waseiko, Regional Sales Mgr., in Detroit. Maxfield was put on the phone with Waseiko, and was told that the factory was "watching" Maxfield closely, that the Ambassadors Maxfield had in stock had "better be sold", or Maxfield would not be in business long. Tr. II-11. Quoting Waseiko, Maxfield said he was told "you better get those Ambassadors sold, or I'll have your ass".

When Mr. Maxfield attempted to go to Morgan with his problems, he incurred Semann's ire. He was told that he should not go around Semann under any circumstances,[8] and, if he kept doing it, Semann said he would put him out of business. Tr. II-13, 14.

Problems with ordering continued. Each month Rushing would visit the dealership with the "spread sheet" showing cars by line and model Maxfield was expected to order. He would have order blanks to cover those units. He would tell Maxfield the allocation represented Maxfield's appropriate share of every line of automobiles. Tr. II-98. Ambassadors and Matadors would arrive quite rapidly after placement of orders, but Gremlins would

8. Rushing told Maxfield "Don't cross Semann or he'll bury you". II-12.

not. Tr. III-170. Initially, on advice of Meyers, Rushing's predecessor, Maxfield contemplated having 10% of inventory in Ambassadors and Matadors. Tr. III-171. As he gained sales experience, he did not want any Ambassadors or Matadors, but he was forcefully "encouraged" to take them in order to get Gremlins. Tr. III-169. Maxfield testified that in order to get 322 Gremlins and 165 Hornets received by the dealership during its tenure, he had to buy 35 Matadors and 32 Ambassadors. AMC tried to "persuade" Maxfield to take the heavy cars "in a very strong manner that if I didn't buy them, my allocation would be less". Rushing said "we had to work together". Rushing didn't use the specific words "If you don't buy Ambassadors and Matadors I'm going to cut off Gremlins", but he said Maxfield had to take Ambassadors and keep a full line, "and to support the full line we had to take the heavy cars to get the 'light cars' ". Maxfield did refuse to buy heavy cars on certain occasions and "I had unfilled orders". Tr. III-173-174.

Robert Bailey, Maxfield's sales manager, who worked with Rushing in placing orders, testified "when they told you the cars to order, you had to order so many Ambassadors and so many Hornets and so many Gremlins, and they specified the number of each." Tr. VII-155.

Before June, 1972, Maxfield received 11 Ambassadors and Matadors. Subsequently, receipts totaled 34 Matadors and 32 Ambassadors. Some were "sold orders" (sold before the order was placed). Lack of experience caused Maxfield to rely on the first orders placed by AMC without voicing objection. Tr. III-181, 183. Later, he did not want any of the heavy cars, but he was required to take approximately 18 additional Ambassadors and

18 additional Matadors in order to get Gremlins. Tr. III-183.

Discrimination in Allocation

AMC's allocation system was discriminatory and coercive. The requirement was imposed that dealers take the "full line" and purchase the dealer's "fair share" of each model in the AMC line.[9] Tr. VII-185; IX-32, 33, 34; VII-148, 149. This ignored the dealer's needs, desires, market demands, and selling history. Although supposedly "days supply" i.e., available inventory of each model based on selling history, was taken into account in allocating each model, the formula was inequitable when applied to a new dealer. It established "travel rate" after two months which did not take into account beginning problems, particularly in areas with no prior AMC sales representation (such as Maxfield's area). The short time to establish "travel rate" eliminated flexibility and tended to produce and perpetuate improper product mix. Starting over with a "clean slate" at introduction of a new year's model did not eliminate the problem, because two months would again be used to establish travel rate.[10] Applying the formula literally made it extremely difficult for a new dealer ever to reach planning potential, although, contractually, his performance was measured by planning potential, and he was responsible for attaining it.

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9. This requirement was not simply a "stocking requirement". As the evidence, particularly of AMC representatives, reveals, each dealer was expected to take his "fair share" of each model, shown on the "spread sheet" on each visit by the district manager.

10. In Maxfield's case, orders for new models were placed within two months after start of operation.

The inequities in the system became highly visible in 1972 and 1973. An article in the Automotive News, dated July 2, 1973, stated that McNealy, AMC Vice President of Marketing, openly admitted that "we didn't discriminate—we were as apt to hurt our friends as our enemies". McNealy testified that the "friends and enemies" language was a poor choice of words, for he was really saying that the system was inflexible to changing needs and "hurt everybody". Tr. VI-69. The article, continuing to quote McNealy, stated that things got so "loused up" in 1973 that AMC devised a new and more responsive distribution system to go into effect with allocation of 1974 models.[11] Tr. VI-70-71.

In Maxfield's case, the allocation formula was only an incidental part of the problem. Maxfield simply did not get the automobiles that he ordered although the orders were picked up, according to the system, once a month by Rushing. Maxfield could have sold every automobile ordered, and if he had been given enough of the salable models to match planning potential, he could have sold them. Tr. II-6, 7. This was verified by Bailey, who remained as sales manager after Maxfield's termination. Bailey stated that, with cars to sell, AMC made a profit the very first month it operated the dealership. New cars were sold as fast as they were serviced. Bailey said "if Maxfield had been given the cars he could have sold them and made the same profit." Tr. VII-157, 158.

There are references in the record to AMC's problems in securing sufficient production to meet demand for

11. According to McNealy, the primary problem with the allocation system was the pick-up of orders on a once a month basis, which slowed response time by AMC. Under the new system, orders were picked up three times a month. Tr. VII-70-76.

smaller cars in 1972 and 1973, but there is considerable evidence that the failure to fill Maxfield's orders did not result from production problems, and that AMC could have filled the orders had it desired.

Schneider stated that there was adequate supply of cars in Houston when Maxfield went into business to give Maxfield what he needed. Tr. XI-117. He further stated that if Maxfield had corrected his "deficiencies" AMC was willing to locate the cars Maxfield needed. Tr. XI-118. (Schneider evaded the question of whether AMC failed to locate the cars because Maxfield refused to take Ambassadors he was supposed to take. Tr. XI-119). Semann said it was possible for Maxfield to have gotten his 1185 unit "planning potential", if Maxfield had been "selling"[12] Tr. XII-95, i.e., if Maxfield's "travel rate" had justified, Maxfield would have been furnished cars to match his planning potential. Tr. XII-95, 96.[13] The question of AMC's ability to deliver needed cars to Maxfield was put to rest in a question by the Trial Court directed to Semann. Noting that there had been testimony that demand for small cars exceeded production, the Court asked: "Would the total of the planning potentials of all the AMC dealers exceed the capacity of the factory to produce the cars?" Semann replied: "That, I really don't know, sir."

Thus, failure to fill orders and supply enough automobiles to meet planning potential cannot be defended on the basis of production problems. Rather, the failure

12. The record shows that Maxfield's sales performance as to small cars was good, and AMC admitted that Maxfield, as all dealers, was successful selling the smaller cars.

13. This does not, of course, explain the failure to fill orders that were taken from Maxfield.

to deliver automobiles to Maxfield was deliberate and arbitrary.

When Maxfield began having problems securing autos, he visited other American dealers in the Houston area, and found that they had in stock the automobiles he could not get. Tr. II-158, 159.

On May 10, 1973, when Maxfield was experiencing operating problems because of shortage of capital, he visited Morgan, Semann, and Waseiko in Detroit. Maxfield was promised an additional 100 cars to be built in June and July, on specified conditions. Tr. VII-41, 42; XI-147; VI-123. No one explained why AMC could promise 100 additional autos when it had failed to deliver over 300 cars that had been ordered.

Conclusive evidence of the deliberate shorting of salable autos was revealed after Maxfield's termination.

P.Ex. 545, entitled "Dealers Status Report" is a computer print-out relating to Maxfield showing status of orders. It contains a "Dealer Recap" showing the number of units ordered that were placed "in system" i.e., actually scheduled to be built, "in transit" i.e., on the way from the factory to the dealer, and "excess" i.e., orders received by AMC but not filled and not placed "in system".

The report shows that on April 12, 1973, Maxfield had four autos "in system", scheduled to be built the weeks of March 12th, March 26th, April 9th, and April 23rd. He had 99 "excess" orders which, according to Schneider, were over and above "dealer's allocation", 361 "total excess" orders,[14] and 10 cars were "in transit".

14. Although there may be some question, from P. Ex. 545, or from testimony, whether the 99 excess orders, described by Schneider

On April 23, 1973, 14 cars were taken out of the "total excess" category and put in the "in system" category. Tr. XI-126.[15] On May 6, 1973, when Maxfield visited Detroit, he had 31 cars "in system", 295 "total excess", and one car "in transit", Tr. XI-127. On May 20th, two days before Maxfield was terminated, he had 46 "in system", scheduled for production during the weeks of May 14th, May 21st, May 28th, June 11th, and June 18th, nine "in transit" and 267 "total excess". On May 24, 1973, two days after Maxfield was terminated, 125 cars were "in system", Tr. XI-129, and 252 were still listed as "total excess". The dealership, at this time, was being operated by AMC. By June 3, 1973, 99 cars were "in system", 61 cars were "in transit", and there were "0" "excess" orders. Tr. XI-130. Thus, AMC, having cancelled 99 orders as being in excess of allocation, consistently carried from 267 to 361 of Maxfield's other orders as "excess", i.e. without recording them as in production, even though the evidence shows that AMC had the capacity to produce and deliver them to Maxfield, and within less than two weeks after Maxfield was terminated the "excess" orders were reduced to "0", i.e.,

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as being over allocation, are included in the 361 total excess orders, the indication is to the contrary. The 99 appears by the heading "excess week", and correlates to the orders for 99 Gremlins that were cancelled by AMC. The figure 361 represents the total of all the orders listed in the line appearing under the heading "excess week". The figure 99 is carried forward consistently in the report, and continues to appear even after excess orders were reduced to 0, subsequent to Maxfield's termination. Accordingly, it appears that the figure of 99 refers to the cancelled order for Gremlins considered in excess of allocation, while the total excess order figure refers to the orders coming within the dealer's allocation but not placed "in system".

15. This correlates to a letter Schneider wrote dated April 23rd saying he had put additional cars in process for Maxfield. Tr. XI-125.

all produced or placed in production. This situation gave rise to interesting answers by Schneider:

"Q. Can you tell this jury why it [cars "in system"] jumped from 46 two days before he was terminated to 125 two days after he was terminated?
A. No, sir, I can't.
Q. What happened to all the excess orders between May 24, 1973 and June 3, 1973?
A. Sir, I don't remember.
Q. Do you know, sir, that within a week after Mr. Maxfield [was terminated], 100 cars came into the location out on Katy Freeway?[16]
A. Sir, I remember, I believe I had, a meeting was held in Detroit and Mr. Maxfield was able to get 100 additional cars.
Q. They built them and delivered them in a hurry didn't they?
A. They were built for him.
Q. Were they, sir? How can you justify that when two days before he was terminated he only had 46 cars in the system and nine in transit—nine and 46. If he had gotten every one in the system built and delivered within the space of a week, when some of them were not scheduled until the week of June 18th, nine and 46 only come up to 55, so where did the 100 cars come from?
A. I have no idea. Must have come from Detroit or something.
Q. They must have. Do you know of anybody that can tell us where all those cars came from?
A. Distribution.
Q. How do you account for the fact that you say this dealership point here was over allocation, that

16. The reference to 100 cars has to do with the fact that approximately 100 cars were delivered to the dealership within four to five days after Maxfield was terminated, all bearing Maxfield stickers. See discussion, *infra*.

within 12 days after Mr. Maxfield went out of business, every single excess order that he had carried ranging from about 260 up to 360 was wiped out, and the cars either delivered or put in the system for the new dealer. How do you explain that, sir?

A. I don't, sir." Tr. XI-130-132.

Bailey remained as sales manager during the time the dealership was operated by AMC. Tr. VII-153, 154. He stated that within four to five days after Maxfield's termination, approximately 100 cars arrived at the dealership. Tr. II-156. Every auto had a Maxfield sticker on it, indicating it had been manufactured for Maxfield. Tr. VII-156, 157. Bailey, who had been in auto dealerships for 20 years, said he had never seen that many cars dropped on a lot in five days in his life. Tr. VII-167.

No one with AMC offered any explanation. The inference that the cars had been withheld while Maxfield was deliberately and arbitrarily "shorted" is inescapable. The automobiles could not possibly have been put "in system" (production) produced, and delivered within a week, and the record (P. Ex. 545) does not show that sufficient cars were put "in system" while Maxfield was a dealer to allow this sort of delivery. The only explanation is that the cars were built while Maxfield was a dealer but were withheld and were not charged against "total excess" orders on the "Dealer Status Report" until after Maxfield's termination.

Termination

Sandstrom succinctly described the troubles of Maxfield in early 1973 as being caused by lack of capital and lack of proper automobiles to sell. Tr. VII-181. Maxfield

began experiencing operating difficulties approximately January, 1973. An overdraft, which the Bank voluntarily carried, developed. Beginning about March, 1973, a series of meetings were held involving Maxfield, AMC, and the Bank. Tr. II-131. AMC presented Maxfield a letter voluntarily terminating the dealership on April 23rd, but Maxfield declined to sign it. Tr. II-132. To correct the overdraft situation, Maxfield tried to raise the capital loan note at the Bank, which had been paid down to $120,000, to its original balance of $150,000. Tr. II-19, 20. The Bank agreed if AMC approved and would guarantee the restated face amount. Tr. II-20. AMC refused. Maxfield contacted other banks, unsuccessfully, and initiated an SBA application. Tr. II-21-22. Semann suggested Maxfield's father be asked to loan $50,000 to the dealership (even though Semann testified in his opinion the dealership would still have gone under). The senior Maxfield indicated he would do so if AMC would agree to restate the capital loan, and give Maxfield a three-year franchise. AMC refused. Tr. II-29-33. At Semann's suggestion, AMC was given authority to look for a buyer for the dealership. Tr. II-42. Maxfield requested consideration as a "DI"[17] dealer but was told by Schneider that AMC would not accept him as a DI operator, although a DI might come in as a potential buyer. Tr. II-45.

On about May 15th, a meeting was held with the Bank and AMC representatives, and Maxfield and Fraker were asked to personally sign a note to the Bank for the overdraft. They refused, but a note was signed on behalf of Maxfield American for the balance. Tr. II-38, 40.

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17. Under the "Dealer Investment" program AMC finances the dealership and retains an ownership interest and voting control during the payout period.

Seven days later, on May 22, 1973, a meeting was called and was attended by AMC representatives Schneider, Semann and Rushing, Dunlop, National DI Director, Miller, a former DI operator, and Sheridan, AMC attorney, Bank representatives Meeks, President, Bolton, Vice-President, and Scott, attorney, and Maxfield, Fraker and their attorney, Hickey. At the time of this meeting,[18] Maxfield was still making efforts to solve his financial problems, and awaiting the processing of the SBA application. Immediately after the meeting convened, AMC, through Sheridan announced its decision to terminate the relationship with Maxfield. Tr. VII-21; VIII-21. This was done even though the time for fulfillment of the conditions specified as a result of the May 10 letter, issued after the Detroit meeting, had not expired.

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18. Testimony of the Bank and AMC sharply conflicted regarding this meeting. AMC said the Bank called the meeting (Schneider, Tr. VI-237), and the Bank said AMC called the meeting (Bolton, Tr. VIII-90; Meeks, Tr. VIII-16). (Rushing is in conflict with his superiors stating Semann called him to set up the meeting, and he in turn called Bolton, Tr. VII-149-150). The Bank said that the first thing that happened at the meeting was that Sheridan, AMC attorney, announced Maxfield was in default under terms of agreements with AMC, and AMC would no longer remain a party to the agreements. The Bank, through its attorney Scott, then announced AMC would no longer stand behind the guarantees. Tr. VII-21. AMC said that the Bank first announced it would withdraw its guarantees, and that AMC did not terminate, but the Bank took over Maxfield's assets. Tr. VII-165-168. Semann said Miller and Dunlop had been summoned by AMC because AMC "planned for eventuality." Tr. VI-175. According to Semann, Miller became the interim operator for the Bank. Tr. VII-173. (This was belied by testimony of employees who remained at the dealership, working for AMC, after termination.) The entire question of termination was left shrouded in mystery by AMC testimony. Waseiko and Morgan stated that termination in the manner it occurred was "impossible" because only the franchise committee in Detroit can terminate a franchise, and it requires signatures of eight to 12 people on a document setting forth the basis for termination. Tr. VI-110-112. Neither Rushing, Schneider or Semann could state the reason Maxfield was terminated. Tr. VI-243, XII-66-67.

The Bank announced it was calling all notes due. Notice of foreclosure was waived by Maxfield and Fraker. Miller took over operation of the dealership upon conclusion of the meeting.

About three weeks later, a letter from AMC dated June 7, 1973 was received by Maxfield. It stated Maxfield was "terminated effective June 4, 1973 because your business has been closed in excess of ten days". P.Ex. 88. The dealership had never been closed during ordinary business hours, while Maxfield was in control of it, nor was it closed after AMC took it over.

At the time of termination, Maxfield was not delinquent in any obligation to the Bank or to AMC.

REASONS FOR GRANTING THE WRIT

1. Although the opinion of the Fifth Circuit recognizes that "coercion" may be implied from a course of dealing, its holding virtually precludes circumstantial evidence and requires that in order to establish coercion, as an element of "tying", the proof must show an express demand that the tied product be purchased and an express threat that failure to purchase it will result in sales of the tying product being curtailed or stopped. Even under this test, the evidence was sufficient to require the issue to be submitted to the jury. But the test is wrong, for coercion, just as any other fact, may be implied from a course of dealing or otherwise proved inferentially or circumstantially, and on this basis the evidence was more than sufficient.

2. The Fifth Circuit's opinion also indicates that "bad faith" under the Automobile Dealers Act must be "co-

ercive", and may be shown only by proof of an express demand that the dealer take action contrary to the dealer's lawful rights on the express threat of sanctions or reprisal by the manufacturer. The evidence meets this test, but, again, the test is improper. Bad faith may be established in other ways, and may be proved circumstantially. Here, the evidence revealed "bad faith" in a number of ways.

ARGUMENT

1. The evidence establishes "tying" in violation of Sec. 1 of the Sherman Act and Sec. 3 of the Clayton Act.

The "tying" offense has become fairly well defined through numerous (but sometimes conflicting) opinions. The Supreme Court had already written on the subject at least four times. (*International Salt Co., Inc. v. U.S.*, 332 U.S. 392, 1947 Trade Cases ¶ 57,635 (1947); *United Shoe Machinery Corp. v. U.S.*, 258 U.S. 451, 1922 Trade Cases 526,2820 (1922); *I.B.M. v. U.S.*, 298 U.S. 131, 1932-1939 Trade Cases ¶ 55,112, (1932-1939); and *Times Picayune v. U.S.*, 345 U.S. 594, 1953 Trade Cases ¶ 67,494 (1953)) when it authored *Northern Pacific Railway Company, etc. v. United States*, 356 U.S. 1, 1958 Trade Cases ¶ 68,961, (1958). There, the Court pronounced language quoted in virtually every subsequent tying case:

> "For our purposes a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Where such conditions are

> successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed 'tying agreements serve hardly any purpose beyond the suppression of competition'. *Standard Oil Co. of California v. United States,* 337 U.S. 293, 305-306. They deny competitors free access to the market for the tied product, not because the party imposing the tying requirement has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons 'tying agreements fare harshly under the laws forbidding restraints of trade', *Times Picayune Publishing Co. v. United States,* 345 U.S. 594, 606. They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial amount of interstate commerce is affected'. *International Salt Company v. United States,* 332 U.S. 392. . . ."

The elements of the offense distilled from *Northern Pacific* are:

1. An agreement by a party to sell one (tying) product on the condition that the buyer purchase a different (tied) product (or at least refrain from purchasing that product from another supplier);

2. Sufficient economic power in the tying product to impose an appreciable restraint of free competition in the tied product; and

3. The involvement of a "not insubstantial" amount of commerce in the tied product.

The elements as defined by the Fifth Circuit are:

(1) Two separate products, the tying product and the tied product;

(2) Sufficient market power in the tying market to coerce purchase of the tied product;

(3) Involvement of a not insubstantial amount of interstate commerce in the tied market; and

(4) Anti-competitive effects in the tied market.

Driskill v. Dallas Cowboys Football Club, Inc., 498 F.2d 321, 323 (5th Cir. 1974).

It has been specifically held, in the context of an Automobile Dealers Act case, that "tying" may be inferred from the Defendant's business practices and conduct. *Westbrook v. Chrysler Corporation*, 419 F. Supp. 824 (N.D. Ga. 1976). See also *Advance Business Systems & Supply v. SCM*, 415 F.2d 55 (4th Cir. 1969), cert. den. 397 U.S. 920, and *Osburn v. Sinclair*, 286 F.2d 832 (4th Cir. 1960), cert. den. 366 U.S. 963.

No attack is made by the Fifth Circuit on proof of any element except No. 2. The Court states that actual coercion is an indispensable element of a tie-in, and violation exists only if the manufacturer goes beyond persuasion and coerces or forces a customer to buy the tied product to obtain the tying product. The Court held there was no "evidence that AMC coerced Maxfield into taking unwanted large cars". This finding purports to be based on the following conclusions:

> (1) What is missing from Maxfield's "list of horrors" is evidence that AMC ever required Maxfield to take large cars or face cut-off of small cars.
>
> (2) Only two conclusory statements, by Maxfield and his sales manager, suggested that such a require-

ment existed; both statements were accompanied by admissions that no one made a threat to that effect.

(3) Maxfield did not show one instance or occurrence showing an enforced requirement that it buy big cars.

(4) On the contrary, the record shows several instances in which Maxfield successfully resisted attempts to place big cars with it.

(5) From December, 1972 when Maxfield refused Ambassadors, through May, 1973, when Maxfield was terminated, Maxfield received only five Matadors and five Ambassadors, but 73 Gremlins and 38 Hornets, was invoiced for 51 more in May, and promised an additional 100 to be built in June and July.

(6) There is no evidence of an implied requirement that Maxfield take big cars in order to get small cars, backed by sanctions. Maxfield contends that after it refused to take Ambassadors, AMC cancelled orders, left orders unfulfilled, and delayed delivery, but there is no evidence of a causal connection between the refusal to take the Ambassadors and AMC's actions. That causal connection is not supplied by the fact that AMC's actions followed Maxfield's refusal.

(7) The uncontradicted evidence is that Maxfield's difficulties were encountered because of a nationwide shortage of small automobiles. No AMC dealer received his full order of small cars. Maxfield fared better than most AMC dealers, a point which is evidenced by consideration of the delivery of 100 automobiles within the week after Maxfield was terminated. This virtually wiped out Maxfield's backlog of orders, and AMC's uncontradicted evidence was that this was a result of Maxfield's urgent pleas for more cars.

The lower Court's laundry list of conclusions is contrary to the evidence, and its "no evidence" finding is insupportable. Rather than follow the rule of *Boeing v. Shipman, supra,* the Court ignored evidence supporting Petitioner's position, and viewed other evidence in the light most favorable to Respondents.

The "laundry list" should more properly read as follows:

(1) Maxfield relied on AMC, and followed its directions as to initial inventory orders. When the heavier cars did not sell and Maxfield resisted ordering more, he was told that he had an "allocation" of each type of car that "needed" to be placed with him. Tr. I-121. Ambassadors were ordered for him by AMC without his consent. Refusal caused AMC to become angry. Tr. I-23, D-2, 3. Maxfield was told he's better sell the heavier cars or AMC would "have his ass" and he would not be in business long. Tr. II-11.

(2) Both Maxfield and his sales manager testified they were told each month the cars to order, and had to order the cars specified, representing an "allocation" of the "full line". Though AMC did not use the specific words "If you don't buy Ambassadors and Matadors, I'm going to cut off Gremlins," AMC "persuaded" Maxfield to take the heavy cars "in a very strong manner, that if I didn't buy them, my allocation would be less" and told Maxfield he had to support the full line and "to support the full line we had to take the heavy cars to get the 'light cars'." Tr. III-173, 174.

(3) Maxfield testified he reached the point where he did not want any of the heavy cars, but was required to

take Ambassadors and additional Matadors to get Gremlins. Tr. III-183.

(4) Maxfield was successful in refusing larger cars when AMC deceitfully ordered for him without his knowledge, and on one or two other occasions, but each time AMC responded angrily and, as a result, Maxfield had unfilled orders. Tr. III-173, 174.

(5) By June, 1972, Maxfield had received 11 Ambassadors and Matadors. Subsequently, receipts totalled 34 Matadors and 32 Ambassadors. Maxfield began resisting purchase of the heavy cars when experience taught the effect of buying them. Tr. III-181-183. After he determined he did not want any more of the larger cars, and so informed AMC, Maxfield was required to take approximately 18 additional Ambassadors and 18 additional Matadors in order to get Gremlins. Tr. III-183. This occurred during a period that was economically critical to his dealership.

(6) After Maxfield began resisting placement of orders for heavy cars the relationship with AMC became strained. Deliveries began to slow down. Tr. II-5. Orders for 99 automobiles were cancelled. Tr. II-5. Maxfield was determnied to be "uncoachable", and after disagreement with AMC, according to AMC's national sales manager, "it was a hopeless thing" and "just a question of time" until the relationship was terminated. Tr. Px-45, 46. AMC had the ability to produce and deliver the cars needed by Maxfield, but, in addition to cancelling the orders for the 99 cars and delaying deliveries, it left orders for 361 cars unfilled.

(7) Although there was talk of a shortage of small cars, the uncontradicted evidence is that the alleged short-

age had nothing to do with Maxfield's problems. AMC admitted that it had enough cars to allow Maxfield to live up to his "planning potential", Tr. XI-17, and if Maxfield had corrected his "deficiencies" AMC was willing to locate the cars he needed. Tr. XI-18. At another point, AMC admitted it was possible for Maxfield to have gotten his 1,185 unit "planning potential", if he had been "selling", although AMC admitted that Maxfield was successful in selling the smaller cars. Tr. XII-95. A third time, in the record, AMC said if Maxfield's "travel rate" had justified, he would have been furnished cars to match his planning potential. Tr. XII-95, 96.[19] Orders for 99 small cars were cancelled, deliveries were delayed and orders for 361 small cars were never delivered. The conclusion that Maxfield was deliberately and arbitrarily shorted is compelled by evidence of delivery of over 100 automobiles to Maxfield's dealership facility the week after Maxfield was terminated. The automobiles all bore stickers showing they were manufactured for Maxfield, not any other dealer or zone "reserve". Tr. VII-156, 157. Only one conclusion can be drawn. The cars were built while Maxfield was a dealer, for Maxfield's dealership, but withheld without recording (on P. Ex. 545) the fact they had been placed in pro-

19. The lower Court's statement that "uncontradicted" evidence showed Maxfield's problems to be due to a "Nationwide shortage" is shown to be totally without record support by a question by the Trial Court to the highest ranking officer of AMC to appear and testify for AMC during the trial. Noting that there had been testimony that demand for small cars exceeded production, the Court asked: "Would the total of the planning potentials of all the AMC dealers exceed the capacity of the factory to produce the cars?" Semann replied: "That, I really don't know, sir." AMC did not produce any testimony that it was not able to produce enough to satisfy all dealers "planning potential," yet Maxfield received far fewer vehicles than his "planning potential" number.

duction. (They were delivered immediately after Maxfield's termination, and apparently only then were they credited against "excess orders" (on P. Ex. 545).[20]

It is unrealistic, in the face of the record, to hold that the issue of coercion, requisite to tying, is not raised by the evidence. The Fifth Circuit opinion is predicated on lack of direct testimony that AMC told Maxfield that if Ambassadors and Matadors were not purchased, supply of Hornets and Gremlins would be cut off.[21] The Court does recognize that an "implied" requirement "backed by sanctions," may be shown, but the effect of the opinion is to make it virtually impossible to prove tying without evidence of an express requirement and threat. This is contrary to the rules of circumstantial evidence, which,

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20. The Court's observation that the record shows that Maxfield was treated better than other dealers, a fact supported by evidence of delivery of approximately 100 vehicles to his dealership the week after he was terminated, is perhaps the worst example of "reverse" application of *Boeing v. Shipman*. The premise is directly contrary to AMC records and testimony. Although the Court's opinion cites the promise to build 100 cars made to Maxfield on May 10 as a response to Maxfield's urgent pleas for small cars, and says that the post termination delivery was a result of Maxfield's urgent pleas, it is impossible for the May 10 conditional promise to have had any connection with the post-termination delivery. Production of the promised 100 cars was not planned until June and July, and Maxfield had not and could not possibly have met the pre-conditions by the time of his termination on May 22. There is not a single word of evidence to support the Court's statement that the delivery of more than 100 small cars the week after Maxfield was terminated was "according to AMC's uncontradicted evidence" "a result of Maxfield's urgent pleas for more small cars". There is simply no way that 100 cars could have been scheduled and built for Maxfield and delivered during the period May 10 - May 29. It is physically impossible and totally inconsistent with the "Dealer Status Report" P. Ex. 545. The records were manipulated and Maxfield was shorted.

21. It would be highly unusual, in view of AMC's previous judicial experience with tying, if its representatives were found to be this unsophisticated.

in antitrust cases, is often the only evidence available. In this case there is both direct and circumstantial evidence that trying was in fact practiced, and that Maxfield was coerced to comply with the practice. The issue should have been submitted to the jury.

2. The evidence establishes a violation of the Automobile Dealers Act.

Title 15, Sec. 1222, U.S.C.A., known as the Automobile Dealers Act, or the Dealers Day in Court Act (DDICA), provides that an automobile dealer may bring suit against any automobile manufacturer who fails to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, cancelling, or not renewing the franchise of a dealer.

Sec. 1221(e) defines good faith as meaning the duty of each party to any franchise to act in a fair and equitable manner toward each other so as to guarantee the one party from coercion, intimidation, or threats of coercion or intimidation from the other party.

The Act, which is regarded as an "extension" of the antitrust laws, was adopted because of abuses in automobile distribution by manufacturers. H.R. 2850. These abuses stemmed from an exaggerated economic disparity between manufacturers and dealers, in an excessively concentrated industry, which allowed manufacturers to impose upon dealers franchise agreements by virtue of which the dealer

> ". . . agrees to conduct his business according to the standards and desires of the manufacturer."

The principal effect of the bill was to give the dealer a right of action against the manufacturer where the manufacturer failed to act in a fair and equitable manner. "Good faith" is to be determined in the context of coercion or intimidation. According to the House Report:

> "The existence of coercion or intimidation depends upon the circumstances arising in each particular case and may be inferred from a course of conduct. For example, manufacturer pressure, direct or indirect, upon a dealer to accept automobiles, parts, accessories, or supplies which the dealer does not need, want, or feel the market is able to absorb, may in appropriate instances constitute coercion or intimidation. Similarly, coercion or intimidation may be found where the manufacturer attempts to require the dealer to handle exclusively, or sell a specified quota of, parts, accessories, and tools made or approved by the manufacturer . . . if the manufacturer goes beyond normal sales recommendation or persuasion, in appropriate circumstances, his activities could give rise to a cause of action under the bill. . . ."

Three types of coercion or "bad faith" envisioned by the House Report are immediately recognizable in the facts of this case: (1) manufacturer pressure to accept automobiles and parts the dealer did not want or need; (2) the requirement that the dealer handle AMC automobiles and parts exclusively; (3) actions going beyond normal sales recommendation or persuasion (recognized by the Fifth Circuit to amount to "obnoxious cajolery") to enforce the manufacturer's desires.

Reported decisions expand on the meaning of good faith. *Blenke Brothers Motors, Inc. v. Chrysler*, 189 F.

Supp. 420, 1960 Trade Cases ¶ 69,704 (N.D. Ill. 1960) pointed out:

> "Compulsion is synonymous with coercion and means in general some actual or threatened exercise of power possessed by the parties exercising it; *but coercion can be accomplished by indirect means, as coercion which is implied from acts. Thus, coercion and intimidation is not necessarily limited to exercise of positive force or direct threat, but may result from any pressure which puts one in actual fear of loss of property or injury to business.*" (Emphasis supplied)

Bergen Rambler, Inc. v. American Motors, 30 F.R.D. 334, 1962 Trade Cases ¶ 70,341 (D.N.J. 1962) recognizes that "tie-in" sales practices amount to a lack of good faith under the DDICA.

Volkswagen Interamericana v. Rohlsen, 360 F.2d 437. 1966 Trade Cases ¶ 71,771 pointed out that:

> "Particularly suspect under the Act are conditions which benefit only, or primarily, the manufacturer—for example, requirements that a dealer purchase large stocks of vehicles, spare parts, special tools or advertising matter."

The case held that termination because of plaintiff's rejection of the defendant as a partner would be "a clear violation of the Dealers Act".

Madsen v. Chrysler, 261 F.Supp. 488, 1966 Trade Cases ¶ 71,950 (D.C. Ill. 1966), held that the termination of a dealer for failure to meet contract quotas ("MSR") violated the DDICA because the quota provision, actually used as a performance goal, was arbitrary,

coercive and unfair, and would have permitted termination of 1/3 to 1/2 of the dealers at any time.

American Motors v. Semke, 384 F.2d 192, 1967 Trade Cases ¶ 72,223 (CA-10 1967) held that the action of an AMC representative in refusing to take orders from Semke for fast selling models because of Semke's refusal to order slow selling models was a violation of the Act. The proof showed Semke voluntarily resigned the dealership after refusal to take the orders. The Court concluded that it was reasonable to interpret the Act as covering an action based on wrongful termination "where the dealer was forced to terminate because of the coercive and intimidative acts of the manufacturer".

In *Mt. Lebanon Motors, Inc. v. Chrysler,* 283 F.Supp. 453, 1968 Trade Cases ¶ 75,523, (D.C. Pa. 1968) the dealer contended he was terminated because of personal animosity arising from his prominent part in promoting opposition by privately financed dealers to the manufacturers operation of "factory stores". The manufacturer contended the dealer was terminated for lack of sales. The Court held it was a jury question whether the action was motivated by honest business judgment or by personal animosity, and, if by the latter, a cause of action existed.

In *Autowest v. Peugeot,* 434 F.2d 556, 1970 Trade Cases ¶ 73,392 (2nd Cir. 1970), a damage award in favor of the plaintiff under the DDICA was affirmed. Autowest had argued to the jury that Peugeot tried to coerce it into following suggested distributor pricing to dealers and that failure to go along was the reason for termination. The Court said:

> ". . . the fact that this is a fringe area of antitrust law is an important factor in our conclusion that

> the coercion and termination in this case are unlawful, for the Automobile Dealers Day in Court Act was designed in part to supplement the antitrust laws. . . . (citing authorities)"[22]

The Fifth Circuit upheld a jury verdict under the DDICA in *York Chrysler v. Chrysler Credit*, 447 F.2d 786, 1971 Trade Cases ¶ 73,636 (5th Cir. 1971). The dealer contended the manufacturer wanted a high volume dealership, and proposed a "dealer enterprise" operation. When the dealer refused to go along, the manufacturer and its sales subsidiary allegedly pursued a course of conduct designed to coerce and intimidate the dealer into complying. The Court held that the jury might properly conclude that the total conduct was violative of the Act. (citing *Semke, supra*). The fact that Chrysler may have had grounds for lawful termination did not permit the Court to set aside a jury verdict after a trial which provided ample opportunity for the defense to be asserted (citing *Frank Chevrolet v. General Motors*, 419 F.2d 1054, 1970 Trade Cases ¶ 72,998 (6th Cir. 1969)).[23]

Junikki Imports v. Toyota, 335 F.Supp. 593, 1972 Trade Cases ¶ 73,911 (N.D. Ill.) held that the manufacturer can not claim it had no duty to supply automobiles because no obligation was stated in the dealer's contract, that the manufacturer had a duty to supply enough vehicles to allow the dealership to be successful, and that deliberately undersupplying stock needed to

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22. The case also contains a pertinent discussion of damages. The Court upheld damages based on a 10-year projection of lost profits very similar to that in the present case.

23. In respect to Chrysler's contention of lawful ground for termination, the case is remarkably similar to the case at hand, for York was precariously short of capital for an extended period, was "out of trust" and insolvent, and its assets were taken over by Chrysler.

cover Plaintiff's overhead, to force Plaintiff out of business, constituted a violation of the Act.

Rea and 22 Ford v. Ford Motor Company, 497 F.2d 577, 1974 Trade Cases ¶ 75,029 (3rd Cir. 1974) held it was a violation of the DDICA for the manufacturer to use coercion on the dealer to cancel a competing (Oldsmobile) dealership owned by the dealer,[24] saying that in applying the definition of good faith, it is necessary to consider not only whether one party brought pressure to bear on the other, but for what reason it did so.

The case of *McGeorge Car Company v. Leyland Motor Sales, Inc.*, 504 F.2d 52, 1974-2 Trade Cases ¶ 75,257 (4th Cir. 1974), involved anti-trust and DDICA claims. Although the court found the conduct complained of did not amount to tying (because McGeorge was free to and did handle cars competitive to the "tied" product, i.e. Rover automobiles) it did

> "agree with the District Court that Leyland's conduct in 'shorting' McGeorge in the delivery of Triumphs in an attempt to compel it to accept the Rover and Land Rover lines constituted a lack of good faith on its part under the Dealers Day in Court Act."[25]

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24. This point was suggested *sua sponte* by the trial court at conclusion of the Plaintiff's evidence, and embraced by Plaintiff. Even though the point was not previously alleged, the Appellate Court found no prejudice resulted to the Defendant.

25. It is interesting that, in apparent contradiction to this reasoning, the Court held that it was proper for Leyland to cancel McGeorge because McGeorge would not "dual" Triumphs with Rovers, saying that this was an entirely separate act dictated by sound business judgment and not "continuing bad faith" infected by the discrimination in the allocation to force the handling of Rovers.

In *Richards v. American Motors*, 1976-1 Trade Cases ¶ 60,796, (D.C. Utah 1976), the Court held that attempts to force the dealer to move, to make him take on other lines, and add a facility he could not afford "is the type of coercive pressure that violates the Automobile Dealers Day in Court Act".

In *Randy's Studebaker Sales, Inc. v. Nissan Motor Corp.*, 533 F.2d 510, 1976-1 Trade Cases ¶ 60,803 (10th Cir. 1976) competing dealers complained to Nissan about Randy's price and Nissan warned Randy to keep its gross margin, and thus the retail price, high. Later a new means of allocating cars, based on a dealer's "planning potential", was introduced. Randy maintained that it was arbitrary and served to diminish his supply and increase the other dealers. Randy's allocation was insufficient for him to break even. Noting that the specific language of H.R. 2850, condemns the practice, the Court said:

> ". . . an effort to compel a dealer to sell a specified quota of its automobiles, parts or accessories would be coercion. This is in contrast to normal sales recommendation or persuasion."[26]

The dealer in *Shor-Line Rambler, Inc. v. American Motors Sales Corporation, supra,* contended that AMC terminated his dealership in bad faith as part of a plan to reduce the number of its small dealerships, and obtained a jury verdict and judgment. The circuit court

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Though this may offend logic, it is not pertinent to the situation at hand, since Maxfield was forced out of business because of the arbitrary "shorting".

26. This case contains a review of evidence of damages, in which a 10-year profit projection was also employed. The approach was parallel to that used by Dr. Stafford to calculate the Maxfield damages. The award was affirmed.

affirmed, saying the issue of bad faith ". . . is a factual determination for the jury".[27]

Coercion, within the meaning of the Dealer's Act, may be implied, and a consistent pattern of conduct, in Defendants' sum total of actions, construable as coercion or intimidation is sufficient to sustain a cause of action. *Zarbock v. Chrysler*, 235 F.Supp. 130 (D. Colo. 1964). Not only is it a violation to exert pressure on a dealer to take parts or automobiles he does not want or need, *Berry Brothers Buick v. General Motors*, 257 F.Supp. 542 (E.D. Pa. 1966), but it has been held to be a violation for a manufacturer to discontinue manufacturing a model it had contracted to sell. *Buono Sales, Inc. v. Chrysler Motors Corporation*, 363 F.2d 43 (3rd Cir. 1966). Allegations that a manufacturer supplied less than an equitable share of cars for the dealer's region are sufficient to state a cause of action. *Sunrise Toyota Ltd. v. Toyota Motor Co.*, 55 F.R.D. 519 (S.D. N.Y. 1972). Imposing condition on renewal or continuance of a dealership, and not allowing sufficient time to meet the conditions, was held coercive and sufficient to sustain a verdict for violation of the act by the Fifth Circuit in *Blackwell v. Kenworth Truck Co.*, 620 F.2d 104 (5th Cir. 1980).

In the case at hand, the authorities support a finding of "bad faith" or "coercion" in a variety of ways. Under *Bergen Ramblers v. AMC, supra*, AMC's tying practice, imposed on Maxfield, amounts to a lack of "good faith"

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27. Damages in this case were also projected over a 10-year period. The award was upheld, the Court quoting *Semke* that "to be meaningful, such damages must include the amount of money that the dealer could have obtained in the future from the profits from his franchise."

under the DDICA. Even if AMC's actions fall short of establishing "tying" under the antitrust laws, AMC's efforts to force sale of the Ambassadors and Matadors give rise to a DDICA claim on the authority of *Semke v. AMC, supra* and *McGeorge v. Leyland, supra.* The animosity of AMC directed toward Maxfield was sufficient to create a cause of action under *Mt. Lebanon v. Chrysler, supra,* as was AMC's conduct designed to intimidate Maxfield into compliance with AMC's wishes. *York Chrysler v. Chrysler Credit, supra.* AMC violated the manufacturer's duty to supply sufficient saleable vehicles to allow the dealership to be successful and deliberately undersupplied Maxfield, which sustains an action on authority of *Junikki Imports v. Toyota, supra.* And the pressure, through both deceit and coercion, to take unwanted and unneeded parts and cars is one of the basic abuses the act was designed to prevent. H. R. 2850, *supra.*

Under the authorities, the jury was entitled to pass on AMC's intentions in light of its actions. Its good faith was a question for the jury's factual determination. The lower courts erred in failing to obtain that determination.

CONCLUSION

The Fifth Circuit opinion ignores essential facts supporting the Petitioner's position, and assumes advocacy of Respondent's factual position, even to the extent of stating the converse of evidence elicited from AMC representatives and records. The basic principle of *Boeing v. Shipman* is, therefore violated but, more fundamentally, the right of trial by jury is denied, for the court usurped the fact finding function.

The temptation for a Court to become the arbiter of facts is ever present. Coloration of the facts that is inconsistent with or unsupported by the record can make the result appear justifiable when it is not. Usurpation of the fact finding function, and surreptitious encroachment on the jury system, must be carefully avoided. It is for this reason that the *Boeing v. Shipman* rule was designed to test grants of directed verdict. The right of trial by jury requires that juries resolve issues of fact.

It is respectfully submitted that this Petition should be granted, and the decisions of the lower courts should be reversed and the cause remanded for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing document has been forwarded to the opposing counsel of record, postage prepaid and properly addressed on this the _____ day of June, 1981.

JACK N. PRICE

APPENDIX

APPENDIX A

BOB MAXFIELD, INC., d/b/a Bob Maxfield American, et al.,
Plaintiffs-Appellants,

and

William Fraker and Aileen Fraker,
Plaintiffs-Cross Appellees,

v.

AMERICAN MOTORS CORPORATION, et al.,
Defendants-Third Party Plaintiffs-Appellees-Cross-Appellants,

v.

James R. MAXFIELD, III, et al.,
Third Party Defendants-Appellants-Cross Appellees.

No. 79-2150

UNITED STATES COURT OF APPEALS
Fifth Circuit
Unit A

Feb. 23, 1981

Automobile dealer brought action against automobile manufacturer alleging antitrust violations and violation of the Automobile Dealers Act. The United States District Court for the Southern District of Texas, Ross N. Sterling, J., granted judgment for the manufacturer and the dealer appealed. The Court of Appeals, Wisdom, Circuit Judge, held that: (1) district court did not abuse its discretion

in refusing to allow dealer's tardy amendment seeking to add allegations of "full-line forcing"; (2) dealer could not recover against manufacturer for alleged antitrust violations, in the absence of evidence that the manufacturer used any coercion to force dealer to accept unwanted big cars in order to obtain small cars; (3) dealer presented no substantial evidence that manufacturer used any coercion and therefore dealer could not recover under the Automobile Dealers Act; and (4) district court did not abuse its discretion in excluding dealer's proffered evidence of manufacturer's alleged attempt to force other dealers to take unwanted cars.

Affirmed in part, vacated in part and remanded.

Appeals from the United States District Court for the Southern District of Texas.

Before WISDOM, GARZA and REAVLEY, Circuit Judges.

WISDOM, Circuit Judge:

This is an action for damages brought under section 1 of the Sherman Act, 15 U.S.C. § 1 (1976); section 3 of the Clayton Act, *id.* § 14; and the Automobile Dealers Act, *id.* §§ 1221-1225. There are also counterclaims, cross-claims, and third party complaints arising out of notes and guaranties made by the plaintiff and its principals. At the close of a jury trial, the district court granted a directed verdict for the defendants on all of the plaintiff's claims. In a separate bench trial, the court granted judgment for the defendants on the counterclaims.

On appeal, the plaintiff asserts several errors: (1) the district court abused its discretion in refusing to permit the plaintiff to amend its complaint; (2) the directed verdicts on the antitrust and Dealers Act charges were improper; (3) the trial judge improperly excluded certain testimony offered by the plaintiff; and (4) the judgment on the counterclaim was improper under Texas law. We affirm the judgment of the district court in all respects as to the plaintiff's antitrust and Dealers Act complaint. We remand the judgment on the claims for indebtedness, however, for a new determination of the amount of the award.

This case concerns the unhappy relationship between American Motors Corporation ("AMC"), a major auto manufacturer, and Bob Maxfield, Inc., one of AMC's retail dealers in the Houston area.[1] Maxfield opened business as an AMC dealer in March 1972. In May 1973 AMC terminated Maxfield's franchise and took over operation of the dealership.

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1. The original plaintiff in the antitrust and Dealers Act suit is Bob Maxfield, Inc., a corporation owned by Bob Maxfield and his business backer, William Fraker. The defendants are AMC, its subsidiaries American Motor Sales Corp. and American Motors Realty Corp., and Memorial Bank of Houston. Memorial Bank counterclaimed against Bob Maxfield, Inc. for indebtedness. It also cross-claimed against American Motors Sales and impleaded Bob Maxfield, William Fraker, and their wives, Sondra Maxfield and Aileen Fraker, all of whom guaranteed the debt of Bob Maxfield, Inc. American Motors Sales cross-claimed against the Maxfields and the Frakers on the guaranty.

The trial judge granted the Bank's motion for a directed verdict at the close of evidence in the antitrust and Dealers Act trial. That ruling is not appealed.

We refer to all of the American Motors defendants collectively as "AMC". For purposes of the antitrust and Dealers Act issues, we refer to the plaintiff as "Maxfield" and to its principal as "Bob Maxfield".

Disputes with AMC marred Maxfield's tenure as a dealer almost from the start.[2] AMC provided Maxfield with an initial inventory of parts; Maxfield could return unneeded stock for full credit within 90 days. Maxfield alleges that AMC urged it to keep the parts for another 90 days, promising to take them back at the end of that time. AMC, it says, reneged on the promise. AMC denies having made the promise. Again, Maxfield alleges that AMC wrongfully delayed giving it permission to install certain lubricating equipment leased from another company.

By far the most important source of friction, however, was the problem of product mix in the line of cars AMC sold to Maxfield. During 1972 and 1973 AMC made two lines of small cars, the Gremlin and the Hornet. These models were very popular—so much so that AMC suffered a nationwide supply shortage and rationed the cars among its dealers. At the same time, AMC's two models of large cars, the Ambassador and the Matador, were considerably less successful on the retail market. The heart of Maxfield's complaint is that AMC made it take large cars that it did not want and could not sell in order to obtain the small cars it needed. AMC, it alleges, made peremptory demands and used hard-sell salesmanship to get Maxfield to take the "full line" of AMC cars. AMC promised to take back unsold big cars and then broke the promise. Finally, when Maxfield re-

2. There were numerous disputes between AMC and Maxfield that may have entered into AMC's decision to terminate the dealership. These concerned the plaintiff's failure to maintain its net working capital at the required $200,000 sum, submission of allegedly false financial statements which inflated the net working capital, poor sales performance, financial problems, and personnel problems. Maxfield does not complain about the termination.

fused to cooperate, allegedly AMC retaliated by cutting back Maxfield's supply of small cars. AMC denies that there was any coercion, deceit, or discrimination.

I. Denial of Leave to File Third Amended Complaint

The original complaint and first amended complaint in this case were filed on July 24, 1973, and February 11, 1974, respectively. Both alleged the same antitrust violation; an illegal tie-in arrangement, in violation of section 1 of the Sherman Act and section 3 of the Clayton Act. The second amended complaint, filed November 7, 1975, added allegations of "full-line forcing", in violation of these same sections, and an attempt to monopolize through a dual distribution system, in violation of section 2 of the Sherman Act.

On April 7, 1977, about a month before the trial date and nearly four years after the commencement of the suit, Maxfield sought leave to file a third amended complaint, adding an allegation of illegal exclusive dealing. The basis for the new allegation was the provision in Maxfield's franchise agreement prohibiting it from obtaining a dealership from any other auto manufacturer.

[1-3] The mere existence of an exclusive dealing clause in a contract does not establish an antitrust violation. As the Supreme Court has held,

> [E]ven though a contract is found to be an exclusive dealing arrangement, it does not violate [section 3 of the Clayton Act] unless the court believes it probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected.

Tampa Electric Co. v. Nashville Coal Co., 1961, 365 U.S. 320, 327, 81 S.Ct. 623, 628, 5 L.Ed.2d 580, 586-87. To determine whether the foreclosed competition is "substantial", the court must look at "the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein". *Id.*, 365 U.S. at 329, 81 S.Ct. at 629. The court must also determine the relevant line of commerce and geographic market. *Id.*, 365 U.S. at 327-28, 81 S.Ct. at 627-28.

AMC opposed Maxfield's motion, pointing out that this was the first time in the suit that Maxfield had asserted any injury resulting from its inability to do business with other auto manufacturers. Because the proposed amendment was filed only one month before the trial, AMC had no opportunity to conduct discovery on any of the points mentioned in *Tampa Electric*. In particular, AMC had not undertaken any discovery as to whether Maxfield would have sought another dealership but for the franchise clause and, if so, whether it could have obtained one and at what cost. Yet if Maxfield were to show any effect on competition, it would have had to show at least some likelihood that it would have sought and obtained a dealership from one of AMC's competitors. In these circumstances, the district court did not abuse its discretion in refusing to allow the tardy amendment. Fed. R. Civ. P. 15(a); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 1971, 401 U.S. 321, 330-31, 91 S.Ct. 795, 802, 28 L.Ed.2d 77, 87-88; *Wealden Corp. v. Schwey*, 5 Cir. 1973, 482 F.2d 550, 552; *Nevels v. Ford Motor*

Co., 5 Cir. 1971, 439 F.2d 251, 257; *Jones v. Metzger Dairies*, 5 Cir. 1964, 334 F.2d 919, 925-26, *cert. denied*, 379 U.S. 965, 85 S.Ct. 659, 13 L.Ed.2d 559 (1965).

II. The Antitrust Directed Verdict

Maxfield's antitrust case relies on two theories: an illegal tie-in, in violation of section 1 of the Sherman Act, and an illegal full-line forcing policy, in violation of section 3 of the Clayton Act.[3] The two theories of liability are substantively synonymous. *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 5 Cir. 1977, 553 F.2d 964, 976, *cert. denied*, 434 U.S. 1087, 98 S.Ct. 1282, 55 L.Ed.2d 792 (1978); L. Sullivan, Handbook of the Law of Antitrust § 153 (1977). We have said that an illegal tying arrangement has four characteristics:

(1) two separate products, the tying product and the tied product;

(2) sufficient market power in the tying market to coerce purchase of the tied product;

(3) involvement of a non insubstantial amount of interstate commerce in the tied market; and

(4) anticompetitive effects in the tied market.

Driskill v. Dallas Cowboys Football Club, Inc., 5 Cir. 1974, 498 F.2d 321, 323.

[4, 5] The trial judge properly granted AMC's motion for a directed verdict on this charge because Maxfield presented no evidence that AMC used any coercion to force it to accept Ambassadors and matadors. We have

3. Maxfield's second amended complaint also alleged an attempt to monopolize retail sales. Maxfield does not appeal the district court's grant of directed verdict for AMC on that count.

held that actual coercion is an indispensable element of a tie-in charge. A manufacturer may use strong persuasion, encouragement, or cajolery to the point of obnoxiousness to induce his retailer to buy its full line of products. An antitrust violation occurs only if it goes beyond persuasion and coerces or forces its customer to buy the tied product in order to obtain the tying product. *Ogden Food Service Corp. v. Mitchell*, 5 Cir. 1980, 614 F.2d 1001, 1002; *Response of Carolina, Inc. v. Leasco Response, Inc.*, 5 Cir. 1976, 537 F.2d 1307, 1327-28.[4]

We cannot see any evidence that AMC coerced Maxfield into taking unwanted large cars. Viewing the record in the light most favorable to Maxfield,[5] we can see that AMC's representatives tried vigorously to sell big cars to Maxfield. On numerous occasions they "informed" Bob Maxfield or his sales manager of the numbers of each model they wanted Maxfield to buy. They "persuaded" or "encouraged" Maxfield to take the suggested number of big cars, and they sometimes became angry when it refused. On one occasion an AMC representative ordered Ambassadors on Maxfield's behalf, without its consent. (Maxfield refused delivery.) Another time a representative talked Maxfield into taking big cars by promising to "move them away" if they did not sell—a promise not kept. AMC's policy was to persuade all of its dealers to take the full line, and there were strong job incentives

4. In *Ogden Food* we noted that the coercion requirement does not apply in suits brought by third party competitors of a supplier who ties his products together. We reaffirmed the *Response* rule as it applies in suits brought by a franchisee against his franchisor. 614 F.2d at 1002 n.3, citing *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 5 Cir. 1977, 553 F.2d 964, 978, *cert. denied*, 434 U.S. 1087, 98 S.Ct. 1282, 55 L.Ed.2d 792 (1978).

5. *Boeing Co. v. Shipman*, 5 Cir. 1969, 411 F.2d 365 (en banc).

for AMC management personnel to carry out that policy. What is entirely missing from this list of horrors, however, is any evidence that AMC ever *required* Maxfield to take large cars or face a cutoff of small cars. At most, there are two ambiguous, conclusory statements by Bob Maxfield and his sales manager suggesting that such a requirement existed—statements accompanied by admissions that no one ever made any actual threat to that effect. In twelve days of trial, Maxfield did not show one instance of any particular occurrence or statement showing an enforced requirement that it buy big cars. On the contrary, the record shows several instances in which Maxfield successfully resisted attempts to place big cars with it.

From December 1972, when plaintiff refused Ambassadors, through May 1973, the last month of the plaintiff's tenure as a dealer, the plaintiff received only 5 Matadors and 5 Ambassadors, but also received 73 Gremlins and 38 Hornets, was invoiced for approximately 51 more in May, and was promised an additional 100 cars to be built in June and July.

Nor was there any evidence of an implied requirement backed by sanctions. Maxfield's case on this point is simple: after it refused to buy big cars, AMC started cancelling orders for small cars, leaving other orders unfilled, and delaying delivery. Here the missing piece is any causal connection between Maxfield's refusal to take the unwanted cars and AMC's reluctance to supply small cars. The weakness in Maxfield's argument is the fallacy, *post hoc ergo propter hoc.* In fact, according to AMC's uncontradicted evidence, the reason for Maxfield's difficulty in obtaining Gremlins and Hornets was that there

was a nationwide shortage of them. No AMC dealer was receiving his full orders of small cars; indeed, the record shows, Maxfield fared better than most AMC dealers.[6]

III. The Direct Verdict on the Automobile Dealers Act

[6] Section 2 of the Automobile Dealers Act provides in part that:

> An automobile dealer may bring suit against any automobile manufacturer . . . and shall recover the damages by him sustained and the cost of suit *by reason of the failure of said automobile manufacturer . . . to act in good faith* in performing or complying with any of the terms or provisions of the franchise, or in terminating, cancelling, or not renewing the franchise with said dealer.
>
> . . . . .

15 U.S.C. § 1222 (1976) (emphasis added). By using a standard of "good faith", the Act seems on first reading to give a wider protection to dealers such as Maxfield than do the tie-in provisions of the antitrust laws. On closer examination, however, it is apparent that the Act

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6. Consider, for example, the mysterious incident of the hundred Gremlins and Hornets. Only a few days after AMC took over Maxfield's dealership, AMC trucks delivered one hundred Gremlins and Hornets there, virtually wiping out the dealership's backlog of unfilled orders. One witness said he had never seen so many cars dumped on one lot at a single time before. Maxfield speculates, with no further factual support, that this proves AMC was holding back Maxfield's small cars, keeping them in some unknown storage field. On the contrary, AMC's uncontradicted evidence shows that this delivery was a result of Maxfield's urgent pleas for more small cars. About a month before termination, AMC responded to those pleas by promising to produce a hundred cars specially for Maxfield. There is no evidence whatsoever of any connection between the promise and delivery, on one hand, and the decision to terminate Maxfield's franchise, on the other.

means less than it purports to say, for it gives "good faith" a much narrower meaning than it has in ordinary legal usage. "Good faith" is defined in section 1(e):

> The term "good faith" shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party *freedom from coercion, intimidation, or threats of coercion or intimidation* from the other party: *Provided,* That recommendation, endorsement, exposition, persuasion, urging, or argument shall not be deemed to constitute a lack of good faith.

15 U.S.C. § 1221(e) (1976) (emphasis added). Accordingly, it is well established that actual coercion, intimidation, or threats are an essential element of a cause of action under the Act. *Southern Rambler Sales, Inc. v. American Motors Corp.*, 5 Cir. 1967, 375 F.2d 932, 935, *cert. denied*, 389 U.S. 832, 88 S.Ct. 105, 19 L.Ed.2d 92 (1967); *Woodard v. General Motors Corp.*, 5 Cir. 1962, 298 F.2d 121, 127, *cert. denied*, 369 U.S. 887, 82 S.Ct. 1161, 8 L.Ed.2d 288 (1962); *see* H.R.Rep. No. 2850, 84th Cong., 2d Sess. 9, *reprinted in* [1956] U.S. Code Cong. & Ad. News, pp. 4596, 4603.[7]

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7. *Accord, e.g., Sherman v. British Leyland Motors, Ltd.*, 9 Cir. 1979, 601 F.2d 429, 445; *Minson Plymouth, Inc. v. Chrysler Motors Corp.*, 4 Cir. 1977, 554 F.2d 1266 (per curiam); *Fray Chevrolet Sales, Inc. v. General Motors Corp.*, 6 Cir. 1976, 536 F.2d 683, 685; *Lawrence Chrysler Plymouth, Inc. v. Chrysler Corp.*, 7 Cir. 1972, 461 F.2d 608, 610, *cert. denied*, 409 U.S. 981, 93 S.Ct. 317, 34 L.Ed.2d 245 (1972); *Autowest, Inc. v. Peugeot, Inc.*, 2 Cir. 1970, 434 F.2d 556, 561; *Hanley v. Chrysler Motors Corp.*, 10 Cir. 1970, 433 F.2d 708, 712; *Kotula v. Ford Motor Co.*, 8 Cir. 1964, 338 F.2d 732, 734, *cert. denied*, 380 U.S. 979, 85 S.Ct. 1333, 14 L.Ed.2d 273 (1965); *Globe Motors, Inc. v. Studebaker-Packard Corp.*, 3 Cir. 1964, 328 F.2d 645, 646.

[7] Maxfield's primary allegation under the Dealers Act is the same as its antitrust allegation: AMC coerced it into buying Ambassadors and Matadors it did not want. As we held with regard to the antitrust complaint, there is no substantial evidence that AMC used any coercion, intimidation, or threats against Maxfield to force it to take big cars.

Maxfield also contends that AMC violated the Act by three lesser sins: its wrongful delay in permitting Maxfield to install another manufacturer's lubrication equipment; its deceitful and unkept promise to take back an overstock of parts; and its deceitful and unkept promise to "move away" certain Ambassadors if Maxfield could not sell them. Assuming that AMC committed these acts (and even assuming that it did so in "bad faith" in the usual sense of the term), however, it is clear that these acts cannot be characterized as coercive, intimidating, or carrying threats. Accordingly, we hold that Maxfield presented no substantial evidence of coercion to support an allegation under the Dealers Act; the directed verdict for AMC was proper.

IV. The Excluded Testimony

[8, 9] Maxfield sought to bolster its case on coercion by presenting testimony[8] by two former AMC dealers and a former AMC official concerning AMC's alleged attempts to force the two other dealers, Robert Semke and

8. Only Robert Semke appeared to testify in person. His testimony was taken outside the presence of the jury. Maxfield sought to introduce depositions of Robert Dilmore and William Morgan. Semke's testimony and Dilmore's deposition were excluded entirely. Parts of Morgan's deposition, relating to Maxfield's dealings with AMC, were read into evidence, but the court excluded other parts dealing with Morgan's testimony in a civil suit brought by Dilmore.

Robert Dilmore, to take unwanted cars. Such testimony is logically relevant to Maxfield's case, within the meaning of Fed. R. Ev. 401, because it bears on the likelihood that AMC exerted similar coercion against Maxfield. Nevertheless, we conclude that its exclusion was not error. Fed. R. Ev. 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Here, the probative value of the excluded testimony is small. Neither the record nor the excluded testimony contains any evidence of any national AMC policy of tying big cars to small cars. On the contrary, Maxfield's consistent theory throughout the case has been that particular AMC representatives acted to force it to take Ambassadors and Matadors. Neither of the two dealers were in the same sales region as Maxfield, and one sold his AMC dealership nearly ten years before Bob Maxfield started his. Neither dealt with the same AMC personnel. Maxfield did not call any of the 17 AMC dealers who had been in business in the Houston area from 1966 to 1976. On the other side of the balance, the possibility of confusion and waste of time is considerable. Admission of the testimony would have required collateral argument as to the merits of the two dealers' complaints. Moreover, AMC has seventeen dealers in the Houston area and more than two thousand nationally. Admission of the testimony would have impelled AMC to bring in evidence a large number of dealers who, AMC asserts, would corroborate its assertion of lack of coercion. In these circum-

stances it was no abuse of discretion to exclude this evidence.[9]

V. The Counterclaim

Having disposed of Maxfield's claims under the antitrust laws and the Dealers Act, we now must address several issues relating to Memorial Bank's counterclaim. This portion of the case involves three sets of transactions. First, Bob Maxfield, Inc. issued a promissory note to the Bank in March 1972 for $150,000 plus interest, in consideration of the Bank's loan for Maxfield's original capitalization. Backing the note was a security agreement between the Bank and Bob Maxfield, Inc., and two guaranty agreements. One was signed by Bob Maxfield,[10] William Fraker, and their wives Sondra Maxfield and Aileen Fraker. The other was a guaranty or take-out letter from AMC. Second, the Bank extended a $600,000 line of credit to Bob Maxfield, Inc. to fund its "floor plan" or continuing inventory of cars. Box Maxfield, Inc. issued a separate promissory note for each car or small set of cars. This floor plan debt was backed by a security agreement from Bob Maxfield, Inc. and by a guaranty agreement signed by the Maxfields and the Frakers. Third, in the spring of 1973 Bob Maxfield, Inc. had run up an overdraft of about $60,000. It issued a new promissory note

9. Even if the exclusion of the testimony was erroneous, it was harmless. Maxfield presented no evidence that *it particularly* was coerced. Without that evidence, AMC was entitled to a directed verdict, even if Maxfield had shown a national tying policy. *See Ungar v. Dunkin' Donuts*, 3 Cir. 1976, 531 F.2d 1211, 1224-25, *cert. denied*, 429 U.S. 823, 97 S.Ct. 74, 50 L.Ed.2d 84 (1976); *Halverson v. Convenient Food Mart, Inc.*, 1974, N.D. Ill., 69 F.R.D. 331, 335-36; *Abercrombie v. Lum's, Inc.*, 1972, S.D. Fla., 345 F.Supp. 387, 391; *Lah v. Shell Oil Co.*, 1970, S.D. Ohio, 50 F.R.D. 198.

10. Bob Maxfield's full name is James R. Maxfield III.

to the Bank for $60,000, backed by a security agreement and an assignment to the Bank of all of Bob Maxfield, Inc.'s factory receivables from AMC.

At trial, the Bank recovered its outstanding deficiencies on all three debts, plus interest and contractual attorney's fees, from Bob Maxfield, Inc. It made a similar recovery on the capital note guaranty and floor plan guaranty from the Maxfields and the Frakers. AMC had already paid the Bank a large sum on its capital note guaranty, but the Bank recovered a judgment against AMC for the remainder on that note and for factory receivables payable to Bob Maxfield, Inc. and assigned to the bank. AMC recovered its capital note payment, as well as interest on the factory receivables, from Bob Maxfield, Inc. and the four individuals.

[10] A. *Maxfield's Setoffs.* The Maxfields and Bob Maxfield, Inc.[11] contend that the trial judge erroneously gave judgment for the whole amount of the debt, ignoring several thousand dollars in "setoffs". The setoffs include financial and physical assets of Bob Maxfield, Inc. seized by the Bank; assets seized by AMC when it took over the dealership; rent for the dealership facilities for the period between the takeover and the foreclosure; and unauthorized charges against Maxfield's parts account.

The Bank argues that the Maxfield parties may not raise these setoffs because they did not plead them as

11. Since this appeal was filed, the Frakers have entirely satisfied the judgments entered against them. The Bank assigned all of its rights under the judgment to the Frakers. In effect, then, the Bank has ceased to be a party to the appeal, and the Frakers now occupy the Bank's former position as appellees with respect to the indebtedness issues. In the interest of clarity, we will continue to refer to the appellees in this matter as "the Bank".

affirmative defenses. Fed. R. Civ. P 8(c); *Chicago Great Western Ry. v. Peeler*, 8 Cir. 1944, 140 F.2d 865. It is not clear to use that these items are setoffs; arguably they bear directly on the amount of the debts outstanding. We need not decide that question, however, because the record shows that both the Bank and AMC consented to litigate these claims at trial. *See Dale Benz, Inc. v. American Casualty Co.*, 9 Cir. 1962, 303 F.2d 80, 84.

The district court made no findings of fact concerning these claims. We vacate the judgments on the debts and remand for reconsideration of the amounts in light of the proof concerning Maxfield's asserted setoffs.

[11] B. *Order of Application.* The Bank, asserting its rights under three security agreements, foreclosed on the assets of Bob Maxfield, Inc. The Bank's calculations, accepted by the district court, apply the proceeds of the foreclosure first to attorney's fees, then to the unguaranteed overdraft note, and finally to the debts guaranteed by the Maxfields and the Frakers. The Maxfields contend that this order of application is inequitable. But the guaranty agreements expressly provide that the Bank is empowered to apply any funds from Bob Maxfield, Inc. first to unguaranteed debt. The guarantors, therefore, have contractually waived any equitable right they might otherwise have had to control the order of application.

[12, 13] C. *Attorneys' fees.* All of Bob Maxfield, Inc.'s notes provide for an attorney's fee of ten percent of the amount due at the time that the notes are put into the hands of an attorney for collection. The Maxfields and Bob Maxfield, Inc. contend that fees should be awarded on only the deficiency remaining after the foreclosure sale (plus subsequent interest), and not on the

entire original amount due when the debtor defaulted. We disagree. Under Texas law, when an attorney acts as trustee to foreclose on a deed of trust but performs no services in his professional capacity, he may not collect the contractual attorney's fee. *Hodges v. Star Lumber & Hardware Co.*, Tex. Civ. App. 1976, 544 S.W.2d 185; *American National Insurance Co. v. Schenck*, Tex. Civ. App. 1935, 85 S.W.2d 833. Here, however, the Bank's attorney took numerous legal steps in preparation to foreclose on the Maxfield assets. It does not matter whether his professional services were directed toward a foreclosure or some other avenue of collection; in either case the notes were put into the hands of an attorney for collection.

[14] The Maxfields contend that they are not personally liable as guarantors for attorney's fees. This is contradicted by the text of their guaranty agreements under which they guarantee "all indebtedness . . . not exceeding the aggregate principal plus interest [on the notes], . . . *together with and plus all . . . costs of collection* owing and which may become owing thereon or in connection therewith". Record at 120, 130 (emphasis added).

The district court's judgment is AFFIRMED as to the antitrust and Automobile Dealers Act complaints. The judgment as to indebtedness is VACATED and REMANDED for reconsideration of the amount in accordance with this opinion.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-2150

BOB MAXFIELD, INC., d/b/a
Bob Maxfield American, ET. AL.,
Plaintiffs-Appellants,

and

WILLIAM FRAKER and AILEEN FRAKER,
Plaintiffs-Cross-Appellees,

versus

AMERICAN MOTORS CORPORATION, ET. AL.,
Defendants-Third Party Plaintiffs-Appellees,
Cross-Appellants,

versus

JAMES R. MAXFIELD,
Third Party Defendants-Appellants, Cross-Appellees.

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING

(MARCH 23, 1981)

Before WISDOM, GARZA and REAVLEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ REYNALDO G. GARZA
United States Circuit Judge

CLERK'S NOTE:

SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE